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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 139

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement

As a result of the decisions below, (101 F. Supp. 66, R. 19; 195 F. 2d 964, R. 29), the respondent is presently at large. But, for more than two years—from February 9, 1950 until May 2, 1952, he was detained and restrained of his liberty. He violated no law and he committed no crime. He was accused of no wrongdoing. No charges were ever lodged or made known to him. The Government asserts

that respondent was not detained in "the usual sense" (R. 7), and yet during this period, as counsel and anyone else could see with their very own eyes, Ignatz Mezei was was incarcerated behind bars at Ellis Island, the same as any other detained alien.

The government alleges that in the absence of any statutory provisions authorizing detention and notwithstanding the Constitution of the United States, the respondent might be so restrained (in the unusual sense) for the rest of his life, without charging him with a crime, without notice of charges and without a hearing.

Respondent alleges in his petition for habeas corpus (R. 2) that he is a native of Great Britain, 54 years of age; that he came to the United States on December 23, 1923 and remained here without interruption until May 17, 1948. He is married to an American citizen-wife, residing in Buffalo, and during the War he worked for the United States Coast Guard, was an air-raid warden, donated blood three times, and was engaged in selling United States war bonds (Par. 1-3). On May 17, 1948, he alleges that he visited Europe to see his dying mother; that thereafter he encountered difficulty in securing an exit permit from Hungary; that he thereafter returned to the United States on February 9, 1950 in possession of appropriate immigration documents (Par. 4-6). On February 9, 1950, he was temporarily excluded by the Immigration authorities pursuant to 8 Code of Federal Regulations 175.57 and that exclusion order was made permanent by the Attorney General on May 10, 1950 (Par. 7-8).

With the exception of two ocean voyages to France in unsuccessful attempts to return him there, respondent was detained continuously by the Immigration authorities since February 9, 1950, a period of two years (Par. 14-16). Four prior writs were brought in this case but each prior

writ was denied because the Government advised the Court that it was prepared to effectuate departure pursuant to the exclusion order of the Attorney General, to France (Par. 23-27). The Government admits its inability to deport respondent to France or to any other country (Gov't brief p. 4). Moreover, in February of 1951, the French Government requested this government to admit respondent to the United States (R. 10).

Paragraph 21 of the petition for habeas corpus alleges that there is no country which is willing to accept respondent pursuant to the order of exclusion which has been entered by the Attorney General, and paragraph 22 alleges that the respondent is unable to secure admission to any other country in the world (R. 4). Respondent has submitted documentary proof that he has been refused permission to enter some 15 countries, including England, the country of his nativity (R. 10-18). These allegations of the petition for habeas corpus were not controverted. The government merely alleges that it has been making an attempt to secure permission for respondent's return to Hungary (par. 14 of the Return, R. 7). It does not state when these efforts were first made, nor why it has been unable to conclude arrangements with Hungary since January of 1951 when it realized that deportation could not be effectuated to France. In addition, counsel has been advised by the Visa Division of the Department of State that since January, 1951—for two full years—negotiations looking toward deportation to Hungary have been conducted without any results.

It is also asserted by the government that respondent may not be released as a matter of law "since even his temporary release would constitute a security hazard" (R. 8) . . . an argumentative conclusory allegation upon which the courts below sought proof.

In addition to the claim that respondent's detention is

unlawful because he has been detained an unreasonable length of time, respondent alleges that his exclusion without a hearing is not based on confidential information which cannot be disclosed; that it is based upon alleged membership in the International Workers Order, an organization which he innocently joined solely for the purpose of insurance benefits; and that therefore, the Attorney General, contrary to his own regulations, has unlawfully and arbitrarily denied respondent a hearing (Petition, par. 8-13). The allegation that exclusion herein is based upon membership in the International Workers Order and that such membership was innocent is not denied in the Return (R. 5-8).

Statute Involved

Section 18 of the Immigration Act of 1917 (8 U. S. C. 154) provides:

> "All aliens brought to this country in violation of law shall be immediately sent back in accommodations of the same class in which they arrived, to the *country whence they respectively came*, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper."

Issues Presented

The issues presented herein are:

1. Whether an excluded alien, whose removal or deportation cannot be effectuated because of lack of a receiving country, may in the absence of statutory authorization and without regard to constitutional guarantees, be detained indefinitely or for the rest of his natural life at Ellis Island.

2. Whether the Attorney General may refuse to grant a hearing to an excluded alien upon security grounds, where it is established that he has not acted in good faith and that confidential information, if it exists, can be revealed.

3. Whether the Attorney General may refuse to reveal, even *in camera*, the basis for an alien's continued detention, where exclusion cannot be effectuated.

Point I

The Government Is Bound by the Undenied Allegations of the Habeas Corpus Petition and the Findings of the Court Below.

It would seem superfluous to review two well recognized principles of pleading and practice. However, the government's attempt to disregard them and its frequent references to matters outside the present record, necessitates this repetition.

First, it is axiomatic, that appellate courts will not disturb findings of trial courts, unless they are clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342; *Orvis* v. *Higgins*, 180 F. 2d 537. Secondly, under Rule 8 (d) of the Rules of Federal Practice, "averments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading." *McComb* v. *Blue Star Auto Stores Inc.*, 164 F. 2d 329, *cert. denied*, 332 U. S. 855; *Moore* v. *Linaham et al.*, 117 F. 2d 140, *cert. denied*, 314 U. S. 628; *Fontes* v. *Porter*, 156 F. 2d 956; *Zydney* v. *New York Credit Men's Ass'n*, 113 F. 2d 986; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242.

Upon the record before this court, the following facts are therefore established in view of the failure of the government to deny any of the allegations of the petition for habeas corpus and in view of the findings of the District Court:

1. That the respondent, a native of Great Britain, resided here lawfully for twenty years, that he is married to an American citizen, and that he went to Europe in 1948 to visit his dying mother. He sought to return to the United

States with proper documents after experiencing difficulty in leaving Hungary (R. 2).

The Government cannot successfully contend that respondent was not lawfully admitted to the United States upon his first arrival here nor go beyond the record as it seeks to do at page 3, notes 1 and 2 of its brief. The record merely shows that respondent's visit to Hungary was a temporary one and that he was delayed there against his will (R. 2-4, paragraphs 1-5, 20 of habeas corpus petition). If the Government has confidential information that the respondent was married in Hungary (Brief, p. 30), it is a little too late to reveal it at this stage of the proceeding.

2. That the primary basis for the exclusion of the respondent without a hearing was his innocent membership in the International Workers Order (R. 3). The Government seeks to call this a self-serving declaration in its brief (p. 35) but the allegation was not denied in the Return and stands admitted.

3. That there is no basis for denying respondent a hearing because of confidential information (R. 3). The Return contains no denial whatsoever of this allegation but merely recites the history of the prior writs of habeas corpus and the administrative ruling herein (R. 5-8).

4. That there is no country in the world which is willing to accept the respondent (R. 4, 5, 19-20). The respondent as well as the Government have been unable to find a foreign country willing to take him. In addition, efforts of the French Line with consulates of various European nations and with the International Refugee Organization brought no results (R. 12). The Government cannot upon this record and the findings of the courts below, maintain the position set forth at page 30 of its brief that respondent might successfully gain entry into some iron curtain country. Moreover, respondent is not required by any provision of law to

seek entry into any country other than France and England, the countries whence he came. (8 U.S.C. 154). Both of these countries have refused to accept him.

5. That the Government is unable to return respondent to the country whence he came. This is admitted at page 4 of the Government's brief.

6. That failure to release respondent will result in his indefinite detention and even for the rest of his life. (R. 4, paragraph 23). In its brief (pp. 9, 28, 31), the Government admits that there will be no limit to the continuance of respondent's detention (if his present parole is revoked) "other than the statutory time limit on the authority of the Attorney General to exclude him." In this connection it should be observed that if the present exclusion is valid, respondent will need a visa or reentry permit to return here—and there is little hope that either document will ever be granted to him until his name is cleared.

Point II

An Alien in Exclusion Proceedings May Not Be Detained An Unreasonable Length of Time

(*A*). *Place of Deportation in Exclusion Proceedings.*

An alien in exclusion proceedings is deportable only to the country whence he came (8 U. S. C. A. 154). In *Wah* v. *Shaughnessy*, 190 F. 2d 488, the court held that 8 U. S. C. A. 156 as amended by Section 23 of the Internal Security Act of 1950 does not apply to exclusion cases. Accordingly the Government does not have the wide range of countries to which it may deport an alien in exclusion cases as it does in deportation cases. The country whence an alien came includes either the country from which he embarked to the United States or the country of his citizenship.

See: *U. S. ex rel. Consola* v. *Karnuth*, 63 F. Supp. 727 at 730.

Some of the reported decisions have erroneously stated that this also includes the alien's country of nativity. However, in *Bellaskus v. Crossman*, 164 F. 2d 412, the Government in the Supreme Court, October 1948 Term, conceded that such interpretation was erroneous and upon the confession of error of the Solicitor General, the Supreme Court reversed (335 U. S. 840).

In the instant case, respondent was born in Great Britain and assuming that he may still be a citizen of Great Britain and therefore deportable there the documentary evidence discloses (R. 10-11) that England has refused to accept him. Significantly, the Government fails to allege in its Return that respondent is a citizen of Hungary or that he was even domiciled there. There is therefore no basis for returning respondent to Hungary even if the Government alleged, as it does not, that it was making immediate preparations to ship him there. If respondent ever were a citizen of Hungary,—and it is doubtful that he ever was since it is believed that his parents are Rumanian—nevertheless he would have lost his Hungarian citizenship in 1933 by reason of his absense from that country. (R. 8). It is therefore submitted that it becomes immaterial whether respondent asserted that he would make no further efforts to depart as alleged in the brief of the government (p. 31) and in paragraph 13 of the Return. (R. 7). Moreover the courts below accepted the documentary proof offered by respondent to indicate that he had made bona fide efforts to secure entrance to 15 other countries. (R. 21, 30). A person detained at Ellis Island by the Government of the United States on the ground that his entry would be prejudicial is handicapped and blacklisted from successful negotiations with other countries. The petition for habeas corpus alleges (Par. 21) that there is no country to which respondent can be deported. This allegation is deemed admitted by

the Government because of its failure to controvert it, *Whitten* v. *Tomlinson*, 160 U. S. 231, 242. In any event it is clear that the Government has had more than a reasonable opportunity to make arrangement to deport respondent to the country whence he came pursuant to 8 U. S. C. 154. For almost three years it has been unsuccessful and there is no indication that it can carry out the command of the statute to deport respondent to the country whence he came within the foreseeable future. Petitioner does not state in its Return or Brief that respondent is today a citizen of Hungary. Although the statute does not permit deportation to Hungary unless respondent is a citizen thereof, the Government sought to defend the writ of habeas corpus upon the ground that it has been negotiating with that country. Moreover, it may be noted that the Hungarian Government has a notorious reputation for refusing to receive the return of its own subjects. In testimony before the House Appropriations Committee, 82nd Congress, relating to the Department of Justice appropriations for 1952, at page 411, the Immigration Service advised Congress that 101 cases had been refused admission to Hungary pursuant to orders of deportation as of February 21, 1951.

(B.) Power to Detain in Exclusion Cases.

In the cases of alien enemies, the Attorney General is given statutory power to detain aliens of hostile countries. By express language contained in the statute which is derived from the war power of Congress, alien enemies may be detained. And, as noted by petitioner (Brief, p. 28), protracted detention of dangerous alien enemies is not subject to judicial interference. *Ludecke* v. *Watkins*, 335 U. S. 160; *U. S. ex rel. Schwartzkopff* v. *Uhl*, 137 F. 2d 898.

The power exercised in the

sional power over aliens of friendly countries. It is not a war power but is now a part of our permanent peacetime legislation (8 U. S. C. A. 137-4). It is a power over immigration which is said to stem either from the concept of sovereignty as known in international law (*Nishimura Ekiu* v. *United States*, 142 U. S. 651) or from the power to regulate commerce with foreign nations (*Turner* v. *Williams*, 194 U. S. 279). Under Section 20(a) of the Internal Security of 1950 (8 U. S. C. A. 156-a) and section 242-c of Public Law 414, 82nd Congress, authority is granted to the Attorney General to detain an alien for six months and no more after the entry of an order of deportation in *expulsion* proceedings. There is no statutory provision whatsoever in *exclusion* proceedings authorizing detention after an order of deportation. The power to detain an excludable alien has been read into the statute. It is a power which is considered a necessary incident of the authority to exclude and it is a power which has been limited to reasonable periods of time ever since *Wong Wing* v. *United States*, 163 U. S. 228.

The right to detain an alien in an immigration proceeding was the subject of early comment by the Supreme Court in connection with the Chinese Exclusion Act of 1892 (27 Stat. 25). In *Wong Wing* v. *United States, supra*, the Supreme Court said at page 235:

> "We thing it clear, that detention or *temporary confinement*, as part of the means necessary to give effect to the provisions for the *exclusion* or expulsion of aliens would be valid."

And in line with this pronouncement of the Supreme Court, it has always been held, that where the government was unable to deport aliens, including those deportable on subversive grounds, their release would be directed. *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C. C. A. 9; Alien

Communist); *Wolck* v. *Weedin*, 58 F. 2d 928 (C. C. A. 9); *Ex Parte Matthews*, 277 Fed. 857 (W. D. Wash.); *U. S. ex rel. Chumura* v. *Smith*, 29 F. 2d 287, (W.D. N.Y.).

The court below, therefore properly observed that (R. 31):

> "* * * the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty."

The district and circuit courts found that "no country has as yet indicated a willingness to accept Mezei" (R. 23, 30) and that his period of detention was unreasonable (R. 24, 31, 32). These findings were not and cannot be controverted. They will not be set aside on appeal unless clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342; *Orvis* v. *Higgins*, 180 F. 2d 537 (C. C. A. 2). The Government seeks to justify the continued detention of the respondent upon three grounds, *i.e.*: (1) That this is an exclusion case where an alien has no constitutional rights, (2) That this is a case of a subversive alien and (3) That the Immigration Service is merely acting as a custodian for the Steamship Company and exclusion is not detention in "the usual sense."

(1). An Excludable Alien May Not be Detained an Unreasonable Period of Time.

The Government admits that the applicable statute is silent upon its power to detain an excluded alien. (Brief, p. 23). The power to detain an excludable alien which is read into the statute as a necessary incident to the power to exclude, should likewise be confined as *Wong Wing* v. *United States*, *supra*, suggests, to a power to detain temporarily for a reasonable time. The courts below so

construed this power, and such construction may be made as a matter of statutory construction apart from constitutional considerations. But, respondent does assert in addition, that the constitution protects all persons in the United States against unreasonable detention whether they be at Ellis Island or in Texas.

Ellis Island is of course part of the United States. It is situated in New York Harbor and in the Southern District of New York. The Federal Government assumed control of the island in 1808. Although the Immigration and Naturalization Service initiated supervision of Ellis Island in 1891, the island has nevertheless continued to be American territory. (Encylopedia Americana.).

An alien at Ellis Island cannot have his property taken away from him without due process of law. An alien detained at Ellis Island who assaulted an immigration inspector, would be entitled to constitutional protection at his criminal trial. We could not condemn a detainee for murder without a trial and without counsel. An immigrant at Ellis Island cannot be detained there for the rest of his life, merely because he is an alien seeking entry. An alien may have no standing to attack the constitutionality of an immigration statute because he has not been admitted as was the case in *Knauff v. Shaughnessy*, 338 U. S. 537. But, that is far short of saying that he has no constitutional rights whatsoever.

No legal legerdemain, no semantic straight-jackets, no voluble ventriloquism, can disguise the fact that respondent was confined and detained for two years upon American soil. The Government speaks of respondent's "so-called detention", of its lack of intent to detain, of "no confinement as such", and of "merely continuing the exclusion" of respondent. (Brief, pp. 9, 18, 27, 37). In law, says the Government, respondent "is still stuck at the border".

(Brief, p. 18) and it would promptly treat him as though he were upon foreign soil for all purposes. If the Government's unrealistic assumption were true, respondent could not even bring on a writ of habeas corpus in the Southern District of New York. How can he even claim that he was detained, no less in New York, if he was stopped at the border and is not here?

Mr. Justice Holmes regarded an alien, detained at or paroled from Ellis Island "as stopped at the boundary line" in interpreting residence under our naturalization statute in *Kaplan* v. *Tod*, 267 U. S. 229. Arrival at or parole from Ellis Island is not lawful admission to the United States, a prerequisite for naturalization. Mr. Justice Holmes was the last person in the world however to believe that the "boundary line" concept should be turned into dogma and "cease to provoke further analysis." (Holmes J., dissenting, in *Hyde* v. *United States*, 225 U. S. 347, 384, 391; Frankfurter, J, concurring, in *Dennis* v. *United States*, 341 U. S. 543). In *Chin Yow* v. *United States*, 208 U. S. 8, 12, 13, Mr. Justice Holmes, refused to apply the fiction of the "boundary line" doctrine and his explanation indicates why fact and not fiction should be applied to the instant case. It was there said:

> "If we regard the petitioner, as in Ju Toy's case (United States v. Ju Toy, 198 U. S. 253, 263 (1905)) it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction . . . still it would be difficult to say he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried back to China . . . *It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts.* De facto he is locked up until carried out of the country against his will." (Italics supplied).

Respondent was detained for two years . . . a period which is obviously an unreasonable length of time. It is submitted that his continued detention under these circumstances was illegal as found by the courts below. In *U. S. ex rel. Chu Leung* v. *Shaughnessy*, 88 F. Supp. 91, the District Court, in an exclusion proceeding commented that "a District Court has the power to release from custody an alien who has been detained an unreasonably long period of time by the Department of Justice after it has become apparent that the warrant for his deportation cannot be effectuated."

In *In re Krajcirovic*, 87 F. Supp. 379, an alien arrived as a stowaway without a passport and was ordered excluded. He was given the same option which the Government contends respondent has, namely to remain in detention or to go to any country that would accept him. He could be returned to Czechoslovakia where he would be executed. Judge Wyzanski said in holding that the alien could only be held for a reasonable time to effectuate deportation:

> "The District Director contends that Krajcirovic is not confined because the Department of Justice has given him the opportunity to depart voluntarily to any place outside the United States. . . . In my opinion this contention rests on an unsound factual basis. Krajcirovic has not at the present time a passport or a visa for any country. While he is in the East Boston station he cannot effectively apply for a visa, at least without the cooperation of the Department of Justice. Even with such cooperation there is no showing that any country except possibly the land of his birth, Czechoslovakia, would admit him. If he did return to Czechoslovakia, he would be executed. . . . In short the option presented by the Department of Justice to Krajcirovic is a Hobson's choice—permission to go home and be executed.

* * * * * * *

"But for the court to refuse to enlarge an alien who is being held by the immigration authorities without his consent, without statutory authority and for some purpose other than reasonably prompt deportation would be to deny him a fundamental constitutional right. For wherever the constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived of his liberty without due process of law." (Italics supplied.)

In *Staniszewski* v. *Watkins*, 80 F. Supp. 132, an alien was excluded on the criminal ground in that he had been convicted of a crime involving moral turpitude. Judge Leibell, in sustaining a writ of habeas corpus, said as follows:

"What is to be done with the petitioner? The government has had him in custody almost seven months and practically admits that it has no place to send him out of this country. . . . I am most concerned with the seemingly helpless status of the petitioner and the failure of the proper officials to find a means of releasing petitioner from confinement at Ellis Island. I intend to sustain the writ of habeas corpus and order the release of the petitioner on his own recognizance. . . . If the government does succeed in arranging for the petitioner's deportation to a country that will be ready to receive him as a resident, it may then advise the petitioner to that effect and arrange for his deportation in the manner provided by law."

In *Petition of Brooks*, 5 F. 2d 238, the court in discussing the power of immigration authorities to hold an alien either in exclusion or in deportation proceedings for an indefinite period of time said as follows:

"The right to arrest and hold or imprison an alien is nothing but a necessary incident *of the right to exclude or deport*. There is no power in this court or in any other tribunal in this country to hold indefi-

nitely any sane citizen or alien in imprisonment except as punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime."

Generally, during periods where shipping facilities are available, periods in excess of four to six months have been held unreasonable, while during war time when shipping facilities were unavailable, periods in excess of a year are held unreasonable. Here shipping facilities are available and even if they were not, certainly a period of detention of two years is unreasonable.

See: *Staniszewski* v. *Watkins*, 80 F. Supp. 132; *U. S. ex rel. Ross* v. *Wallis*, 279 Fed. 401, 403; *Moraites* v. *Delany*, 46 F. Supp. 425, 431.

The Government seeks to deny the applicability of the foregoing cases and relies upon *Knauff* v. *Shaughnessy*, 338 U. S. 537. The *Knauff* case concerned the power of Congress and the Immigration officials to exclude an alien. There was no problem of illegal detention because of inability to deport Mrs. Knauff. Mrs. Knauff was born in Germany and deportation could be effectuated to Germany. Nor is the problem here involved, one where the alien seeks to attack the constitutionality of an exclusion statute. As noted by the court in *Chu Leung* v. *Shaughnessy*, [supra], and by Judge Wysanski in *U. S. ex rel. Janavaris* v. *Nicolls*, 47 F. Supp. 201, we are here concerned with the power of the court to enlarge an alien who has been held an unreasonably long period of time, a power which the court unquestionably has. An alien thus enlarged is not admitted to the United States, but his prison bounds are enlarged. *Kaplan* v. *Tod*, 267 U. S. 229.

There is neither statutory nor constitutional power to detain respondent in the instant case for the indefinite

duration of the emergency (which has continued since 1941) *or as long as any two foreign states are at war.* (22 U.S.C. 223 Section 215, Public Law 414, 82nd Cong.; 66 Stat. 190). Habeas corpus properly permits his release to prevent unwarranted and illegal detention.

Apart from the judicial power to direct release because of unwarranted and illegal detention, is the power of the court to review the denial of administrative bail or parole, where such denial is founded upon abuse of discretion. *Potash* v. *District Director*, 169 F. 2d 747; *U. S. ex rel Pirinsky* v. *Shaughnessy*, 177 F. 2d 708. Where an alien's deportation or exclusion cannot be effectuated, it is an abuse of discretion for the Government to continue his detention. Until the post-World War II hysteria and panic seized our Immigration and Naturalization Service, excluded aliens—even those with questionable political backgrounds—were routinely granted parole where they had no place to which they could return.

The Government's assertion that under existing law, administrative bail or parole in exclusion cases is authorized only for witnesses in criminal prosecutions (Brief, pp. 24, 25) is less than a frank disclosure of existing and long standing administrative interpretation of the statute. As far back as 1915, Esther Kaplan, excluded because of mental deficiency, was placed on parole by immigration authorities (*Kaplan* v. *Tod*, 267 U. S. 229). From that year at least, until today, the practice of the immigration authorities has been to parole excluded aliens, even though they were not prospective witnesses in criminal trials. The Immigration Manual of the Immigration and Naturalization Service, published in 1944 contains the following at pages 5169-5170:

> "An alien who arrives at a port of entry, applies for admission, and is excluded may, when the dictates of

humanity demand such action, be paroled into the United States.

The parole of an inadmissible alien, under proper conditions or safeguards, may be authorized by the port authorities——

(A) For an alien wife of a United States citizen, resident of the United States, who has accompanied her husband abroad and innocently failed to obtain an immigration visa or to conform to the requirements of law.

(B) For registry. . . . (A method of legalizing the status of an alien)

(C) For criminal prosecution in the United States.

(D) For emergency medical or surgical treatment.

(E) In such other exceptional cases in which to do otherwise would be inhuman or hold the Service up to ridicule."

Respondent cannot be deported because there is no receiving country. He cannot be placed aboard a ship and assume the role of a Flying Dutchman, because there is no statutory authority for such action. He must be returned to the place from whence he came, and the statutory mandate cannot be accomplished. He cannot be detained indefinitely. The dictates of humanity, the constitution and the law, require that the respondent be at large until exclusion can be effectuated.

(2) *An Alleged Subversive Alien Is Entitled to Enlargement or Parole.*

The government in addition to arguing that the court had no power to enlarge the respondent as a matter of law, also argues and states in its Return that the respondent is a security risk (R. 8). Respondent alleges facts upon

which the court may evaluate this allegation. He states —and it is not denied—that he has been residing in the United States for 25 years, and that he has assisted our war effort during this period of time and that he has an American born wife (R. 2). For over 25 years petitioner was at large in the United States and the internal security of the country was not endangered. The walls of the republic remained unshaken. The Government's allegations of security risk are merely conclusory in character and similar allegations have been criticized by the courts. In *U. S. ex rel. Klig* v. *Shaughnessy*, 94 F. Supp. 157, Judge Ryan stated:

> "Particularly noteworthy in the government's return is the failure to even suggest that if relators are enlarged on bond they might be unavailable when needed in connection with their deportation proceedings. Apparently, revocation of bail is sought to be justified solely on the claim that relators constitute a 'security peril.' But not a scintilla of evidence relating to any recent activity on the part of relator has been adduced to substantiate this general allegation. . . ."

See also: *Ex parte Senter*, 94 F. Supp. 77; *Ex Parte Estrada*, 93 F. Supp. 713.

In *U. S. ex rel. Pirinsky* v. *Shaughnessy*, 177 F. 2d 708, the Government contended that any member of a subversive organization was a security risk and would endanger the public safety upon enlargement. The Court of Appeals nevertheless pointed out that the Government had to show immediate or particular danger from the individual involved beyond that which might be expected from mere membership in a subversive organization.

Here, as in *U. S. ex rel. Heikkinen* v. *Gordon*, 190 F. 2d 16, 21 (dismissed as moot by the Supreme Court on November 10, 1952), detention is sought to be justified upon the ground of membership in the International Workers Order.

In the *Heikkinen* case, the Court of Appeals found that refusal by the Attorney General to enlarge an alien on bail upon the ground of such membership was arbitrary and an abuse of discretion.

In the instant case, the petition for habeas corpus alleges that the basis of exclusion herein was innocent membership in an organization which was then on the Attorney General's subversive list (International Workers Order) and which the Supreme Court later ruled was improperly on such subversive list (R. 3). *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 at 134. Applying the test of the *Pirinsky* and *Heikkinen* cases to the undenied allegations of the petition that the basis of exclusion herein was innocent membership in the International Workers Order, it is submitted that respondent was properly enlarged without danger to the internal security of the country.

The Government's contention (Brief, p. 19) that spies may thus enter the country is inapplicable in the instant situation. There is no allegation, nor any foundation, for any contention that this respondent is a spy. We are dealing not with someone who has been sent to the United States by a foreign government, but on the contrary with an individual who has had 25 years of residence here, who has an American wife here; and who returned to the United States with appropriate documents issued by an American Consul abroad. Even if he were a spy, which is not alleged here, we have criminal laws to deal with espionage and attempted espionage. The immigration statutes were not intended to displace those laws, and as we learned during the recent war, when Germany attempted to land espionage agents, our government was alert to deal with them outside our immigration laws. This case should be decided upon the allegations of the petition for habeas corpus, the return,

the documentary proof before the court, and not upon hypothetical situations.

The imagination can hardly create a situation more incompatible with the spirit of our free institutions than that one civil official's completely secret viewpoint could be the basis of sustained imprisonment. The unsubstantiated conclusory allegation of the government that respondent was a "security hazard" (R. 8) was properly deemed insufficient in the face of the undenied affirmative allegations of the petition for habeas corpus. The return should have alleged facts, not mere conclusions of law. *Stretton* v. *Shaheen*, 176 Fed. 735. By its return, the government should have certified "the true cause of detention" 28 U. S. C. 2243. See, *Longsdorf, Habeas Corpus—A Protean Writ and Remedy*, 10 Ohio St. Law Journal, 301, 310-312. The statute governing habeas corpus does not permit the continued detention of an individual to be justified upon secret administrative determinations, the cases do not permit it, and the national security does not require it.

In keeping with the demands of justice and to adjust the situation to the vigorous unsupported conclusory allegation that the respondent was a security hazard, the District Court offered the Government an opportunity to substantiate its claim *in camera*. (R. 25). This opportunity was refused, apparently because our immigration officials believed that so-called confidential information, (about which a word will be said later) can not in the best interests of the United States, be revealed even to the judiciary.

The objection that revelation would prejudice the national security is not present when the technique of an *in camera* hearing by the court is available. *In camera* hearings were adopted as a judicial technique in admiralty proceedings during World War II. [316 U. S. 717 (1942,

adopted), 328 U. S. 882 (1946, suspended), *United States* v. *Leahy*, 148 F. 2d 462, 463 note 1.]

The Government has been called against its objections in an increasing number of cases to produce so-called confidential information in the interests of justice. Thus, a motion to produce relevant documents is available against the government, despite objections against disclosure. *United States* v. *Cotton Valley Operators Committee*, 9 F. R. D. 719, affirmed by an equally divided court in 339 U. S. 940. See also: *United States* v. *Schneiderman*, 21 Law Week 2069. In criminal prosecutions, the Government must support its charges by revelation, or forego the prosecution. *United States* v. *Andolschek*, 142 F. 2d 503; *United States* v. *Keown*, 19 F. Supp. 639.

In *United States* v. *Coplon*, 185 F. 2d 629, 638, cert. denied 342 U. S. 920, Judge Learned Hand observed:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."

This doctrine of compelling disclosure by the government, based upon waiver of nondisclosure by the institution of suit and elementary justice, has been applied to the cases of aliens in habeas corpus proceedings. In *U. S. ex rel Schlueter* v. *Watkins*, 67 F. Supp. 556, affirmed, 158 F. 2d 853, the District Court made the following comments:

> True, the United States is not the plaintiff in such a proceeding (habeas corpus) and hence cannot be said to waive the privilege by virtue of instituting the action; but the United States did take the action, i.e. detaining the petitioner, which is the subject of review. Moreover the theory of waiver upon which the requirement of disclosure has been based seems to me to be the kind of useful fiction which the law invents to express an underlying public policy. That public policy

is that a person should not be deprived of his liberty without giving him an opportunity to have access to the material which might exculpate him."

In *U. S. ex rel Lee Till Seem* v. *Shaughnessy*, 104 F. Supp. 819, the use of the *in camera* procedure revealed not only that the relator was unlawfully detained but also that the so called confidential information was not confidential at all and could have been revealed without endangering security. Respondent has alleged in the instant case, that the so called adverse information can properly be revealed without danger to the internal security of the nation (R. 3). He has alleged affirmative facts to indicate that he is not a security risk. The neglect of the government to allege facts supporting its general conclusion of security hazard and its refusal to reveal substantiating evidence *in camera* supports the charges made herein, that the adverse information is inconsequential as intimated by the courts below. In any event, the government's course of action prevented the courts below from reaching any other conclusion. The only evidence before the District Court revealed that respondent was not a security risk. In determining whether to release him in habeas corpus proceedings, (and assuming that he was properly excluded) the District Judge, was entitled, if not compelled, to act upon the evidence—the undenied factual allegations of the petition for habeas corpus. Upon this record, no conclusion of security risk, is warranted. Upon this record, the courts below, properly determined to grant bail to respondent.

(3) The Responsibility for the Respondent's Continued Detention and for His Removal to the Place From Whence He Came is Upon the Government.

In the realm of fancy and fiction, the Government makes three contentions. First, it insists that the respondent has

been stopped at our border and is not upon American soil. We have indicated the fallacy of this contention. Secondly, it observes that respondent was not really detained or confined. It admits that at the present time his liberty should be restrained at Ellis Island because no country will take him but in the same breath it adds that in a sense the United States is no more restraining him than France or England. The only difference is said to be that we are "providing the respondent with shelter and food". (Brief, p. 18, and note 8). The District Court rejecting this contention stated: "This, in view of the clear documentary evidence that Mezei cannot gain admission anywhere, hardly jibes with the usual cold realism of immigration policies." (R. 22). Even if respondent were still aboard ship instead of at Ellis Island, as was the case when the writ of habeas corpus was issued, he would have been restrained of his liberty. That was decided as far back as 1884 in the case of *In re Chow Goo Pooi*, 25 Fed. 77, 78 where it was said:

> "We are unanimously of opinion that when a Chinese person is detained on board of a ship and refused the right to land, whether by the authority of the master in pursuance of the provisions of the Chinese restriction act, or by the refusal of the collector to grant him permission to land, he is restrained of his liberty under or by color of the authority of the U. S., and that he is entitled as of common right to sue out a writ of habeas corpus, that the legality of his detention and restraint may be passed upon by the court." See *U. S. ex rel Belardi* v. *Day*, 50 F. 2d 816.

Finally, the Government insists that its work is done when it enters an order of exclusion (Brief, p. 27 et seq.). The mandate of the statute, however, is not only for the Attorney General to exclude inadmissible aliens, but also to send them back "to the country whence they respectively

came." (8. U. S. C. 154). There is no provision permitting the creation of a Flying Dutchman.

The Government cannot simply execute one half of the statutory mandate and sit idly by with the respondent in detention for the rest of his life. Respondent's present predicament is due to the invitation, privilege, or call-it-what-you-will, given to him in the form of a visa, to reenter the United States. He came here in good faith seeking reunion with his family and found himself detained at Ellis Island without notice or charges, and without an opportunity to be heard. As noted by the Circuit Court of Appeals (R. 34):

> "* * * the plight of the relator is actually much worse that if the charge against him had been formulated as one for indictment and criminal prosecution; for then he would have had the ordinary safeguards of judge and jury and face at least a definite punishment."

In every sense of the word, respondent was detained and restrained of his liberty and his failure to be at large in the United States or elsewhere was a situation which was not of his own making. The fact that the expenses of his detention were being paid by the steamship company, did not relieve the government of responsibility. The statute places the enforcement of our immigration laws upon the Attorney General and his subordinates. Because of factors beyond the control of respondent and the government, it is not possible to enforce the mandate of the statute to deport in the instant case. Continued and unreasonable detention in a civil proceeding like this is neither warranted by the statute nor under our democratic form of government. Respondent is entitled to his liberty until deportation becomes feasible.

Point III

Respondent's Continued Detention Without a Hearing Was Illegal

In its petition for certiorari (p. 9) and its brief (p. 10), the Government, apparently oblivious of the record herein, asserts that the exclusion order itself is not under attack. It was attacked in the courts below (R. 21) and is under attack here.

Paragraphs 9 to 13 of the petition for a writ of habeas corpus (R. 3) allege that there is no confidential information which cannot be disclosed and that the only basis for exclusion is innocent membership in the International Workers Order. These allegations were not denied and stand admitted. No classified information could have been revealed had the Government alleged in its return that other grounds existed for the exclusion of respondent. It did not deny these allegations because they are true. And if they stand unrebutted as they must, the Attorney General is acting contrary to the mandate of Congress and his own regulations which require that there be confidential information which would endanger security or conflict with the national interests, if revealed. Under these circumstances, the denial of a hearing is contrary to law. (Of course, if a returning lawful resident is entitled to a hearing, then respondent has an additional ground for contesting his exclusion without a hearing. This issue is before the Court, in *Chew* v. *Colding*, No. 17, this Term).

Respondent is not barred from questioning the legality of the denial of a hearing to him by reason of the denial of prior writs herein. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 240. It is true that in alien enemy cases, there may be no review of abuse of discretion *Ludecke* v. *Watkins*, 335 U. S. 160. But in immigration cases there may be a review of abuse of discretion. *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999. And it follows

as a necessary corollary that where the administrative officers of the government have improperly interpreted immigration statutes or regulations issued thereunder, and neglected to follow them, judicial review is permitted even in exclusion cases. *Geigow* v. *Uhl*, 239 U. S. 3.

Respondent does not question the right of the Attorney General to enter an order of exclusion against him where the Attorney General complies with the statute and the regulations pertaining to the same. He does not question the right of the immigration authorities to exclude an alien without a hearing when a finding is made in good faith that a hearing will result in the disclosure of confidential information which would be prejudicial to the best interests of the United States. In the instant case, unlike *Knauff* v. *Shaughnessy*, 338 U. S. 537, respondent has alleged that the Attorney General has acted capriciously, that he has excluded him without a hearing because of innocent membership in the International Workers Order, and that there is no basis for denying a hearing on the ground of confidential information (R. 3). The Immigration officials in the instant case in excluding respondent in 1950 relied upon his membership in the International Workers Order in view of its subversive listing by the Attorney General, a listing which the Supreme Court later ruled improper on April 30, 1951. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 134.

In addition, a review of immigration procedures and practices makes one wonder whether arbitrary despotism, insane panic or hysterical nonsense, rather than common sense control determinations to deny hearings. The facts are as follows:

1. Edward J. Ennis, formerly Director of the Alien Enemy Control Unit, in the Department of Justice, and the first administrative official to be vested with the power to deny aliens entry without a hearing, testified as follows

before the President's Commission on Immigration and Naturalization on September 30, 1952:

> "*Exclusion on secret denunciations*—The Ellen Knauff case (338 U. S. 537) dramatized the problem of exclusion of arriving aliens on the basis of confidential information 'the disclosure of which would be prejudicial to the public interest' (8 CFR 175.57). Originally these regulations were published in November 1941 while the war was raging in Europe for the purpose of dealing with exceptional and extraordinary spy cases which might arise. It was believed that the requirement that the Attorney General certify that disclosure would be against the public interest would insure the most sparing use of this extraordinary procedure. It was not thought at the time that after the end of hostilities this procedure might be used in the relatively large number of cases involving persons not a serious menace to our safety. Unfortunately the Knauff and similar cases suggests that the certification safeguard has not been wholly satisfactory and that the exceptional authority has been delegated to subordinates who may not fully appreciate the gravity of condemning an individual on secret evidence. The dangers of this procedure are best realized by reading the opinion of the Board of Immigration Appeals in the Knauff case (conveniently contained as an appendix to 'The Ellen Knauff Story') which analyses the evidence upon which the alien was deprived of her liberty for more than a year."
>
> See also: *Must Liberty Bow Her Head in Shame?*, Reader's Digest, August 1952, p. 4.

2. Immigration statistics reveal that in the past 3½ years over 500 aliens have been excluded without a hearing (Hearings, before the President's Commission on Immigration and Naturalization, p. 1965). Most of these exclusions occurred at the Canadian border. Acting upon hearsay supplied by the Royal Mounted Police, without knowledge of the authors of the adverse information, and oft-times without any verification of the authenticity of these

hearsay reports, our immigration officials exclude without a hearing.

3. In the interests of security, all names of individuals are considered confidential. Thus in the foreword to Volume I of its published decisions, the Immigration Service remarks that its records are considered confidential and therefore the names of persons are omitted from its decisions. At page 391 of Volume I, reference is made to the case of I- T-, 36 Ops. Atty. Gen. 535. The name of *Ingrid Tobiassen*, well known to the bar in view of the discussion in *Perkins* v. *Elg*, 307 U. S. 325, thus is a state secret. In mimeographed releases of its decisions, however, the non-disclosure of confidential names, reaches its climax. Thus, Interim Decision No. 94, only dares refer to Congressman K— in recalling his statement about the Displaced Persons Act on the floor of Congress on June 10, 1948. And, Interim Decision No. 96 of the Immigration Service, has the boldness to mention the name of the book, "I Saw Poland Betrayed", but can only indicate its author as A— B— L—. It is therefore readily apparent, that all informants of the Immigration Service, whether they be Congressmen who accuse on the floor of the House or authors who publish their denunciations in books available to the public, are "confidential informants," whose accusations cannot be revealed in the public interest.

4. In *Lee Till Seem* v. *Shaughnessy*, 104 F. Supp. 819, confidential information revealed to the court *in camera*, was found to be utterly undeserving of such classification.

5. In hearings before the Senate Subcommittee on Immigration, in connection with the amendment to the Displaced Persons Act of 1948, a top immigration official of the Immigration Service, Mr. Almanza Tripp, testified on February 15, 1950 under oath as follows at pages 664 and 665:

> "In the first place, there are almost no cases where we have absolute proof that a person is subversive.

We have had many cases where there is doubt. Now of the doubtful cases, I have referred probably between 5 and 10 to our central office under a special procedure provided for by section 175.53 and section 175.57, 8 C. F. R., which authorizes the Attorney General to exclude without hearing.

* * * * * * *

"So, in those cases, even though the evidence is weak—although in some cases it is a little stronger than others—I am reluctant to pass them unless we can prove that that person is a good security risk.

* * * * * * *

"Now some of the information from central registry might allege that this particular displaced person has been engaged in communistic activities. . . . The source of the information is no longer available. Now when we have a case of that sort where central registry contains something of a derogatory nature, I do not believe we should make a finding of admissibility until it is disproved. But the evidence that they had in central registry would not be sufficient to exclude by the normal board of special inquiry proceedings because those proceedings must be conducted in a manner in which they could not be subject to attack in a court of the United States.

"You may say that it is unfair to the applicant not to give him that protection, but you must remember that the applicant is an applicant. He has no rights. I think it is well within our province to select only those whom we feel are desirable."

In view of the foregoing, it would appear that the practice of the Immigration Service is not to deny a hearing because of a finding that the disclosure of confidential information would be against the best interests of the United States but rather because of a realization that to grant a hearing

would mean that they must reveal the weakness of their case against an alien. The regulations, 8 C. F. R. 175.57, specifically require a finding that the Government is unable to disclose confidential information because it would result in prejudice to the best interests of the United States. This obviously means a finding made in good faith with some basis in fact. Significantly, in the instant case, beyond a conclusory statement that the information cannot be revealed, there is not a scintilla of evidence or of factual basis to indicate that the disclosure of information would expose a confidential informant or impair his future usefulness. Here again, it is respectfully submitted that the government's Return should state some facts upon which it could be logically concluded that the denial of a hearing was based in good faith upon a belief by the Immigration Service that such hearing would result in a disclosure of confidential information which would prejudice the public interest.

If the *Knauff* case is any guide, it may be noted that *after* the Attorney General contended that a hearing would disclose confidential information and be contrary to the public interest, he granted her a hearing which resulted in her admission to the United States (20 L. W. 2194).

In view of the foregoing, the sworn testimony of Almanza Tripp, it is respectfully submitted that respondent is entitled on this record to a hearing and counsel believes that the imagination can hardly create a situation more incompatible with the spirit of our democratic institutions than the practice and procedure described by Mr. Tripp. Counsel believes that if the Immigration Service is to justify the continued detention of respondent at Ellis Island, as an arm of our democratic government, it owes the court, the public and the respondent the duty of coming forward with some more substantial basis than it has to justify the further imprisonment of respondent.

Conclusion

If the fate of the respondent alone were to be decided by this case, it would be of small moment. Our democratic processes themselves are at stake. On December 15, 1952, President Truman observed that:

> "Hysteria impels people to destroy the very thing they are struggling to preserve. * * * For us to embrace the methods and morals of communism in order to defeat Communist aggression would be a moral disaster worse than any physical catastrophe."

See also:

Stack v. *Boyle*, 342 U. S. 1, 6.
O'Brian, New Encroachments on Individual Freedom, 66 Harvard Law Review 1, 26.

The Court below properly found the detention of respondent illegal and appropriately observed (R. 34):

> "If in fact our country needs so drastic a restraint as this, violative of all our concepts of due process, against this individual thus situated, then it would indeed seem admitted, as a former distinguished Attorney General has pointed out, that 'our institutions do not have the sturdiness which our words to the rest of the world announce, and will falter under the greater impact of the alien dogma.'"

Respectfully submitted,

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